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No. 04-1230

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WRIGHT ELECTRIC, INC.,
Petitioner,

v.

THOMAS A. OUELLETTE, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 292, AFL-CIO, and MICHAEL J. PRIEM,
Respondents.

On Petition for a Writ of Certiorari to the Minnesota Court of Appeals

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD L. KASPARI *
METCALF, KASPARI, HOWARD, ENGDAHL & LAZARUS, P.A.
1660 South Highway 100 #333
Minneapolis, MN 55416-1573
(952) 591-9444

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the Minnesota Court of Appeals correctly held that a non-union employer's state court common law misrepresentation action arising from its hiring and firing of a union member who concealed his prior union-related employment on his job application is preempted by the exclusive jurisdiction of the National Labor Relations Board, under the principles established in ***San Diego Building Trades Council v. Garmon***, 359 U.S. 236 (1959), and its progeny, on the ground that the specific facts alleged in this case were sufficient to show an arguable violation of §8(a)(3) of the National Labor Relations Act because that the union member "was arguably fired [by the employer] due to his union status." Pet. App. 26a.

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STATEMENT OF THE CASE

This litigation grows out of a union organizing effort during which the employer hired and fired a union member engaged in organizing activity.

Petitioner Wright Electric, Inc. is a non-union electrical contractor with a record of discriminating against job applicants who reveal union membership when seeking employment. ***Wright Electric, Inc.***, 327 NLRB 1194, 1195-96 (1999), enf'd 200 F.3d 1162 (8th Cir. 2000).

Respondent Thomas A. Ouellette is a journeyman electrician and member of Respondent International Brotherhood of Electrical Workers Local 292. Ouellette applied for work

at Wright Electric at the suggestion of Respondent Michael J. Priem, a Local 292 business agent, in order to earn a living at his trade and to seek support among his fellow electricians for Local 292. Priem advised Ouellette that, if Ouellette disclosed his union membership by identifying the contractors that he had worked for since becoming a union member two and a half years previously, Wright Electric would not hire him. Ouellette filled out a written employment history when applying at Wright Electric, which accurately reported the amount and nature of his electrician's experience, but "stretched" his initial, three and a half year employment with a non-union contractor to cover the entire six-year period preceding his application to Wright, omitting non-union contractor BE&K Construction Co., which had discriminated against Ouellette for union activity immediately after he joined Local 292[1] and the union contractors for whom he had worked during the prior two years.

Ouellette was hired by Wright Electric and performed admittedly satisfactory work for four months. Wright Electric then assigned Ouellette to a project at which managers of another non-union contractor recognized Ouellette as a union electrician and reported his union membership to Wright Electric managers. Wright Electric immediately sent Ouellette home. Ouellette then advised Priem that he had been identified to Wright Electric as a union member, and Priem sent Wright Electric's manager a letter confirming Ouellette's union membership and his organizing activity among Wright's employees. Wright fired Ouellette very shortly thereafter.

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[1] The NLRB issued a complaint against BE&K to that effect, which BE&K settled through an agreement which promised to expunge all reference to the discriminatory discipline from Ouellette's file. Yet, Petitioner obtained these "expunged" disciplinary records from BE&K after initiating this action and now claims that Ouellette unlawfully concealed this "expunged" disciplinary record by omitting BE&K from his employment history. See Pet. 2 and Pet. App. 26a-27a.

Local 292 filed a charge with the National Labor Relations Board alleging that Wright Electric had discriminated against Ouellette on account of his union status in a manner prohibited by §8(a)(3) of the National Labor Relations Act. Wright Electric responded with a position statement claiming that Ouellette had been laid off for lack of work, only coincidentally on the same day Wright learned of his union membership, and fired several days later for violating strict and uniformly enforced company rules requiring an accurate employment history for all job applicants and prohibiting work-related dishonesty of any kind. The NLRB Regional Office, on the strength of that position statement and without any further investigation, dismissed the charge without issuing a complaint.

Wright Electric then brought this action, alleging no fewer than eleven state common law tort claims against each of the Respondents, all sounding in misrepresentation and all based on Ouellette's having given an inaccurate employment history on his job application.[2] In defending this action, Respondents discovered that Wright Electric provided patently false information in its position statement to the NLRB. Specifically, Respondents learned that:

(1) when Wright Electric sent Ouellette home on account of a claimed "lack of work," Wright assigned an

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[2] After Wright Electric brought this action, Local 292 filed an additional charge with the NLRB asserting that Wright's prosecution of this suit violated §§8(a)(1) and (3) of the NLRA. The NLRB's General Counsel issued a complaint alleging that, under the rule in ***Bill Johnson's Restaurants v. NLRB***, 461 U.S. 731 (1983), Wright's prosecution of this action was legally malicious because it was brought in retaliation for the Respondent's conduct protected by §7 of the NLRA and lacked a reasonable basis in state law. The NLRB ruled that it could not proceed on that complaint unless and until Wright Electric's action was dismissed by final judgment of the state courts. ***Wright Electric, Inc.***, *supra*. This Court subsequently overruled ***Bill Johnson's Restaurants*** in ***BE&K Construction Co. v. NLRB***, 536 U.S. 516 (2002).

unlicensed apprentice to complete the project on which Ouellette had been working, without the journeyman supervision required by state law;

(2) Wright Electric in fact obtained pre-hire employment histories from only about half of its electricians and only sporadically checked those obtained;

(3) when Wright Electric's managers serendipitously discovered that a newly-hired non-union employee who claimed twenty months of prior electrical experience on his application in fact had only two weeks of prior experience, Wright took no disciplinary action other than to delay his first, experience-based wage increase;

(4) when Wright Electric discovered that two of its non-union electricians had defrauded customers by padding their time and expense records, it took no recorded disciplinary action at all; and

(5) Wright Electric, in fact, had never significantly disciplined any other employee for any dishonesty of any kind.

On the basis of this discovered information, Respondents moved for summary judgment on the ground that, under the principles of ***San Diego Building Trades Council v. Garmon***, 359 U.S. 236 (1959), the NLRB's exclusive jurisdiction preempts Wright Electric's state court action, because the facts alleged were sufficient to show that the NLRA arguably prohibited Wright Electric's conduct in this matter and arguably protected Ouellette's conduct. The trial court denied Respondents' motion. The Minnesota Court of Appeals reversed, holding that, on the record in this case:

> Appellants have carried their 'burden of showing at least an arguable case' that Wright Electric's claims are preempted by the NLRA because Ouellette was arguably fired due to his union status."

Pet. App. 26a, quoting ***International Longshoremen's Ass'n v. Davis***, 476 U.S. 380, 395-96 (1986).

Wright Electric petitioned the Minnesota Supreme Court for discretionary review of the Minnesota Court of Appeals' decision. By order dated December 14, 2004, the Minnesota Supreme Court denied review. Pet. App. 31a.

ARGUMENT

THIS CASE DOES NOT PRESENT ANY QUESTION WARRANTING THIS COURT'S REVIEW.

The Minnesota Court of Appeals' narrowly tailored, fact specific ruling that the primary jurisdiction of the NLRB preempts Petitioner's state court action is firmly rooted in the principles developed in ***San Diego Building Trades Council v. Garmon***, 359 U.S. 236 (1959), and its progeny, and the sound application of those principles to the facts alleged by the parties concerning the NLRA-regulated employer and employee conduct giving rise to this litigation. The lower court's holding does not conflict, or even cause the slightest tension, with any other NLRA preemption ruling of any other court. Because the Minnesota court's ruling is entirely consistent with this Court's well-settled ***Garmon*** preemption jurisprudence, it raises no question warranting review.

The Petitioner essentially concedes as much by ignoring the holding below in stating its first "Question Presented for Review" and "Reasons for Allowing the Writ." (Pet. pp. i and 7-13.) Instead, in framing that first "Question," Petitioner proceeds as if the Minnesota court had generated a question of federal law by issuing a substantive ruling construing §7 of the NLRA delineating the extent of §7's protection of job applicants who misrepresent their qualifications. But the Minnesota court issued no such ruling. Recognizing the limits of its jurisdiction under ***Garmon***, the lower court confined its holding to ruling on whether the conduct giving rise to this action is *arguably* protected *or* prohibited by the NLRA, and, therefore, within the exclusive primary jurisdiction of the NLRB. Simply stated, the

decision below does not raise the substantive question of federal labor law tendered by the Petitioner in its first "Question Presented for Review." The lower court's review of those cases raises no issue warranting this Court's review.

To the extent that the Petitioner acknowledges that this is a preemption case at all, in its second "Question Presented for Review" and secondary "Reasons for Allowing the Writ" (Pet. pp. i and 13-14), it mischaracterizes the decision below as a ruling based on substantive principles that stands for the proposition that "the NLRA preempts all state tort law claims by employers against employee applicants who lie on their employment applications with regard to their qualifications." (Pet. p. i. See also, Pet. pp. 13-18.) But the Minnesota court made no substantive NLRA ruling, much less one of such scope, and cautioned against any broad reading of its limited, ***Garmon*** preemption decision. This sound, fact specific, ***Garmon***-based preemption ruling poses no question warranting this Court's review.

I. THE MINNESOTA COURT'S DECISION IS AN ENTIRELY SOUND AND UNEXCEPTIONAL *GARMON* PREEMPTION RULING.

The Minnesota Court of Appeals began the ***Garmon*** preemption analysis through which it decided this case by quoting the following passage from its own decision in ***Jara v. Buckbee-Mears Co.***, 469 N.W.2d 727, 729 (Minn. App. 1991), which accurately and succinctly summarized the foundational principles of ***Garmon*** preemption based on the exclusive jurisdiction of the NLRB:

> When an activity is arguably subject to section 7 or 8 of the National Labor Relations Act (NLRA), both the state and federal courts must defer to the exclusive competence of the National Labor Relations Board (NLRB) to avoid the danger of state interference with national policy. See *San Diego Building Trades Council*

> *v. Garmon*, 359 U.S. 236, 245 (1959). The party asserting preemption must show that the alleged activity is arguably protected or prohibited by the NLRA and that the NLRB reasonably could uphold the party's claim. See *International Longshoremen's Association v. Davis*, 476 U.S. 380, 395 (1986).

Pet. App. 21a. The lower court then elucidated the meaning of "arguably protected or prohibited by the NLRA" by quoting this Court's decision in ***International Longshoremen's Ass'n v. Davis***, as follows:

> The United States Supreme Court has addressed and defined "arguably" in deciding when an activity is "arguably protected or prohibited" stating:
>
> > If the word "arguably" is to mean anything, it must mean that the party claiming preemption is required to demonstrate that his case is one that the [NLRB] could legally decide in his favor. That is, a party asserting preemption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the [NLRB]. The party must then put forth enough evidence to enable the court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation.
> >
> > . . . .
> >
> > [T]hose claiming preemption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted.
>
> *Int'l Longshoremen's Ass'n*, 476 U.S. at 395-96. The Supreme Court also noted that "a court first must decide whether there is an arguable case for preemption; if there is, it must defer to the [NLRB], and only if the [NLRB] decides that the conduct is not protected or prohibited may the court entertain the litigation." *Id.* at 397.

Pet. App. 21a-22a. With these preliminaries, the Minnesota court then turned to a discussion of ***Hartman Brothers***

Heating & Air Conditioning, Inc. v. NLRB, 280 F.3d 1110, 1112-13 (7th Cir. 2002); and ***Winn-Dixie Stores, Inc.***, 236 NLRB 1547, 1547, 1549 (1978), which recognized that §7 of the NLRA may still protect an employee who conceals his union status by misstating his employment history when seeking a job with a non-union employer, and that §8 of the Act prohibits the firing of such an employee upon discovery of such concealment if the firing is motivated by the employee's union status rather than the concealment of employment history as such. Pet. App. 22a-24a. On the basis of that review, the Minnesota court concluded:

> [The Defendants have] advanced an interpretation of the NLRA "that is not plainly contrary to its language and has not been 'authoritatively rejected' by the courts or the [NLRB]." . . . . The remaining issue then is whether [the Defendants] have "put forth enough evidence to enable [this] court to find that the [NLRB] reasonably could uphold a claim based on such an interpretation."

Pet. App. 24a [citations omitted]. As the final step in its analysis, the Minnesota court addressed that issue and reached its holding reasoning as follows:

> We first note that the parties dispute the reason Ouellette falsified his employment application and the basis for Wright Electric's termination of Ouellette. . . .
>
> But this court cannot serve as the fact finder. . . . Our sole task is to determine whether [the Defendants have] "put forth enough evidence to enable [this] court to find that the [NLRB] could reasonably uphold a claim based on such an interpretation." . . . . We believe that Appellants have shown, and Wright Electric admits, that Wright Electric has never been a signatory to any collective bargaining agreement with any labor organization. The record also shows that Ouellette was fired a few days after supervisors discovered that he had worked for union contractors in the past. Moreover, Ouellette's firing occurred a few days after Priem faxed

> a letter to Wright Electric and handdelivered a copy of the letter to Stavrum, informing him that Ouellette was a union member engaged in protected union-organizing activity during his non-working time. In addition, the record indicates that Ouellette's work was isfactory and that he had not been disciplined until he as fired. From this evidence, appellants have carried their "burden of showing at least an arguable case" that Wright Electric's claims are preempted by the NLRA because Ouellette was arguably fired due to his union status.

Pet. App. 24a-26a [citations omitted].

In sum, the Minnesota Court of Appeals reached its holding by applying the black letter law of ***Garmon*** preemption to the particular facts here which showed that Wright Electric's state court action concerned what is, in substance, ordinary unfair labor practice case. Its entirely sound and thoroughly ordinary preemption decision presents no issue warranting review by the Court.

II. THE MINNESOTA COURT MADE NO SUBSTANTIVE RULING ON THE SCOPE OR MEANING OF §7 OR §8 OF THE NATIONAL LABOR RELATIONS ACT.

The decision below does not raise the first "Question Presented for Review" the Petitioner tenders to this Court as follows:

> Whether the state court of appeals erred in ruling that the National Labor Relations Act creates a protected right of employee applicants to lie on their employment applications with regard to their qualifications, a ruling that conflicts with holdings of the federal courts and the National Labor Relations Board.

Pet. p. i [citations omitted], and which Petitioner advances as the main reason for granting review at Pet. pp. 7-13. Nor did

the lower court issue any ruling which presents the second "Question for Review" tendered by Petitioner as follows:

> Whether the state court of appeals erred in ruling that the NLRA preempts all state tort law claims by employers against employee applicants who lie on their employment applications with regard to their qualifications, a ruling that conflicts with numerous federal court holdings regarding the scope of federal labor law preemption of state laws.

Pet. p. i, and which Petitioner discusses as a secondary "Reason for Allowing the Writ" at Pet. pp. 13-17. The Minnesota Court of Appeals' decision addressed only one issue: whether, under ***Garmon*** and its progeny, the alleged conduct giving rise to this action falls within the exclusive primary jurisdiction of the NLRB or within the primary jurisdiction of the Minnesota courts. The lower court did not issue, or even purport to issue, any substantive ruling construing the National Labor Relations Act, much less one holding that the Act "creates a protected right of job applicants to lie on their employment applications with regard to their qualifications" or one holding "that the NLRA preempts all state law tort claims by employers against employees who lie on their employment applications with regard to their qualifications," much less "one which conflicts with the holdings of the federal courts and the National Labor Relations Board."

As noted above, the Minnesota court discussed decisional law construing the protection provided by §7 of the NLRA only in the context of its ***Garmon*** preemption analysis as follows:

> [Respondents] rely on two decisions in support of its position that the NLRA protects "salts" who conceal their union affiliation when applying for jobs with non-union employers . . . . *Winn-Dixie Stores, Inc.*, [236 NLRB 1547 (1978)] . . . [and] *Hartman Brothers*

> *Heating & Air Conditioning, Inc. v. NLRB*, [280 F.3d 1110 (7th Cir. 2002)] . . . .
>
> Based on the NLRB and Seventh Circuit decisions . . . we conclude that the [Respondents have] advanced an interpretation of the NLRA "that is not plainly contrary to its language and has not been 'authoritatively rejected' by the courts or the [NLRB]."

Pet. App. 22a-24a. The Minnesota court then reviewed the evidence bearing on Wright Electric's motivations in firing Ouellette and concluded:

> From this evidence, [Respondents] have carried their "burden of showing at least an arguable case" that Wright Electric's claims are preempted by the NLRA because Ouellette was arguably fired due to his union status.

Pet. App. 26a.

As the foregoing makes plain, the Minnesota court made no substantive ruling regarding the protections provided by §7 of the NLRA or the prohibitions contained in §8 of the Act. Instead, the lower court confined its inquiry to ascertaining the *arguable* protections and prohibitions of the NLRA, reflecting its sound understanding of ***Garmon***'s central holding: that the construction of the NLRA's substantive terms is reserved for the NLRB and the federal appellate court's exercising their jurisdiction on review under §10 of the Act.

Indeed, after reaching its holding, the Minnesota court took pains to emphasize the limited nature of its ruling. Ironically, the Petitioner takes the lower court's post-holding comments out of context and misrepresents that discussion as a holding that §7 of the NLRA substantively protects job applicants who lie about their qualifications and preempts all state regulation of such conduct on behalf of employers. Pet. pp. 5-7. After completing its ***Garmon*** analysis and holding that

"Wright Electric's claims are preempted because Ouellette was arguably fired due to his union status," the Minnesota court simply cautioned that:

> [T]he NLRB has held that "[e]ducational background, criminal record, and history of compensation claims are all factors which a potential employer may lawfully take into account in deciding whether to hire an applicant, and hence a discharge for falsification of information on such matters does not itself violate" the NLRA. *Winn-Dixie Stores, Inc.*, 236 N.L.R.B. at 1547. Similarly, common sense suggests that an employer should also be able to take into account problems or disciplinary measures that a past employer has had with the applicant, if such problems or disciplinary measures do not relate to the applicant's union affiliation . . . .
>
> But therein lies the rub. As the law now stands, an applicant/salt may permissibly falsify his application and thereby hide negative, relevant spects of his qualifications (even past misconduct), if the past misconduct with non-union employers happened to occur during the same time that the applicant/salt was also engaged in protected union activities. In such cases, we believe a salt has met the minimal burden of demonstrating that falsifying an application by omitting any reference to the employer in question is "arguably protected" under the NLRA. Until the NLRB or the United States Supreme Court addresses this anomaly, the law compels the result that we reach here today.

Pet. App. 26a-27a.

In short, the Petitioner's effort to transmute the Minnesota court's holding into a statement of substantive NLRA law rests solely on the lower court's cautionary *dicta*.

In fairness to the Minnesota Court of Appeals, Respondents note that its post-holding comments in this case contain none of the sweeping propositions attributed by the Petitioner's tendered "Questions for Review." The lower court

may fairly be read as saying that, under the NLRB's decisional law, as reviewed by the federal appellate courts, one cannot make even an arguable case that an employer is prohibited from firing an employee for falsifying information bearing on any legitimate qualification; but, that the NLRA does arguably protect a union member who falsifies his employment history to conceal union affiliation, even if doing so conceals past misconduct, if that employee is fired not for giving a false work history, but for his union membership and activity. The Minnesota court then notes that, until the decisional law is changed by the NLRB or the Supreme Court on review of an NLRB decision, it must reach this conclusion – a situation which it finds anomalous. In short, these closing comments by the lower court on which Petitioner leans so heavily are both innocuous and at several removes from the actual holding of its decision.

Because the Minnesota Court of Appeals' decision makes no substantive ruling construing the NLRA, it presents neither of the "Questions for Review" proposed by the Petitioner, nor any other question warranting this Court's review.

III. THE LOWER COURT'S DECISION COMPORTS WITH OTHER SETTLED LAW REGARDING NLRA PREEMPTION.

Having mischaracterized the Minnesota Court of Appeals' decision as one holding that "the NLRA preempts all state tort law claims by employers against employee applicants who lie on their employment applications with regard to their qualifications" (Pet. p. i), the Petitioner argues that this straw ruling conflicts with this Court's decisions in ***Belknap v. Hale***, 463 U.S. 491 (1983); and ***Sears, Roebuck & Co. v. San Diego Co. District Council of Carpenters***, 436 U.S. 180 (1978). The Minnesota court's much narrower, ***Garmon*** preemption holding is entirely consistent with both ***Belknap*** and ***Sears***.

Petitioner first misstates this Court's holding in ***Belknap*** as declaring that "state law claims of fraud were not preempted by the NLRA." (Pet. p. 14.) The Court actually held in ***Belknap*** that persons who had accepted employment during a strike on the basis of the employer's promise of "permanent" employment and then were immediately laid off on the strike's conclusion could sue on that promise for damages in state court, noting that such employer conduct "is of peripheral concern to the federal law [and] touches interests deeply rooted in local feeling and responsibility." 463 U.S. at 498. The ***Belknap*** Court then noted that preemption was particularly inappropriate because the NLRB could only address the question of whether the employer's offer of permanent employment to other workers infringed on the strikers' rights, and could not determine whether the employer had unlawfully broken its promise to the replacement workers. 463 U.S. at 510-11.

The behaviors at issue in this case—a union salt's omission of employers whose mention in his employment history would identify him as a union member to the non-union employer where he is seeking work, and the non-union employer's dismissal of the salt immediately after discovering his union membership—raise precisely the same sort of issues regarding the limits of acceptable conduct in advancing or resisting union organization which the NLRA places under the NLRB's primary jurisdiction. These issues concerning the balance of power between employers and employees in the context of union organizing touch few traditional concerns of local regulators. If the General Counsel had issued a complaint in this case, the NLRB would have determined whether Wright Electric actually and lawfully relied to its detriment on the employment history provided by Ouellette when it hired him and on his omissions from that history when it fired him, or whether Wright relied solely on the fact that that history disclosed only non-union prior employment and fired Ouellette because its managers discovered he was a

union member. Through this action, Wright Electric seeks to place these very same issues before a state court, in a textbook intrusion on the NLRB's exclusive jurisdiction.

As noted above, the Minnesota court made no holding concerning the much broader question of employers' general legal rights against employees who obtain their positions by materially misrepresenting their qualifications. However, even this much larger issue has such shallow roots in "local feeling and responsibility" that the Petitioner cannot cite a single decision from a court of record in any jurisdiction even recognizing an employer's cause of action for "resume fraud," much less awarding a remedy on such a cause.[3]

In sum, the Minnesota court's decision offers no conflict of any sort with this Court's decision in ***Belknap***.

Next, Petitioner argues that its action should avoid preemption under the rule in ***Sears, Roebuck & Co. v. San Diego Co. District Council of Carpenters***, 436 U.S. 180, 197 (1978), permitting state court proceedings when "the party who could have presented the [NLRA] protection issue to the NLRB has not done so and the other party to the dispute has no acceptable means of doing so." However, unlike the union in the ***Sears*** case, the Union immediately brought this matter to the NLRB by filing a charge with the NLRB alleging that Wright Electric terminated Ouellette because of his union activity, rather than any other alleged misconduct. If the Petitioner wished to bring tort claims against the Respondents based on that same set of events, it should have invited a complaint from the General Counsel and hoped to prevail before the Board on its claim that it actually relied on

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[3] The cases cited by the Petitioner stand only for the proposition that an employer may assert "resume fraud" as an affirmative defense to employee claims for unlawful termination. ***Sarvis v. Vermont State Colleges***, 772 A.2d 494 (Vt. 2001); and ***Crawford Rehabilitation Services, Inc. v. Weissman***, 938 P.2d 540, 549 (Colo. 1997).

Ouellette's alleged "resume fraud" as the basis for firing him. Had it done so, as the lower court noted, it would have been free to pursue this action. See, Pet. App. 27a.

Instead, Wright Electric chose to misrepresent its actual employment policies and practices during the General Counsel's investigation. The General Counsel's exercise of prosecutorial discretion (following Petitioner's misrepresentations) in deciding not to issue a complaint on the Union's charge does nothing to limit the preemptive reach of the Board's primary jurisdiction in this matter. ***San Diego Building Trades Council v. Garmon***, 359 U.S. at 245-46.

The lower court's decision results from the application of the very well-settled law of ***Garmon*** preemption to the facts of a matter which is, in the first instance, an unfair labor practice case. This matter presents no issue warranting the Court's review.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari in this matter should be denied.

Respectfully submitted,

RICHARD L. KASPARI *
METCALF, KASPARI, HOWARD,
ENGDAHL & LAZARUS, P.A.
1660 South Highway 100 #333
Minneapolis, MN 55416-1573
(952) 591-9444

* Counsel of Record

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